Supreme Court, U.S.
FILED
NOV 2 3 2003
OFFICE OF THE CLERK

No. 03-437

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

ERIC I. EISEN,
Petitioner,

V.

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the denial of a certificate of appealability by the United States Court of Appeals for the Third Circuit of Appeals was in accord with the standard established by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029 (2003)?

II. Whether the denial of a certificate of appealability was in error where the United States District Court for the Western District failed to consider newly discovered evidence?

III. Whether the denial of a certificate of appealability was in accord with the standard established by this Court where petitioner failed to make a substantial showing of the denial of a constitutional right regarding petitioner's guilty plea?

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The Orders and Opinions of the Court of Common Pleas of Allegheny County, Pennsylvania, the Superior Court of Pennsylvania, the Supreme Court of Pennsylvania, the United States Magistrate Judge, the United States District Court for the Western District of Pennsylvania, and the United States Court of Appeals for the Third Circuit are included in the Appendix to the Petition for Writ of Certiorari filed by petitioner, Eric I. Eisen.

JURISDICTION

Petitioner has invoked jurisdiction pursuant to 28 U.S.C.A. §1254(1).

STATEMENT OF THE CASE

Procedural History

Petitioner, Eric I. Eisen, was charged by Criminal Informations filed in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. At CC 199302685, petitioner was charged with one (1) count of Criminal Homicide[1]. At CC 199304232, petitioner was charged with one (1) count of Robbery[2] and two (2) counts of Criminal Conspiracy[3]. The charges contained in both Informations arose from the actions of petitioner and his co-defendant, James C. Smith, on or about February 8, 1993, in North Fayette Township, Allegheny County, Pennsylvania, which resulted in the shooting death of Daniel Bostedo. Pursuant to Rule 1127 of the Pennsylvania Rules of Criminal Procedure the homicide cases of petitioner and his co-defendant were initially

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1 18 Pa.C.S.A. §2501

2 18 Pa.C.S.A. §3701

3 18 Pa.C.S.A. §903

joined together for trial, but later severed on April 19, 1993, by court order.

On or about May 20, 1993, William Manifesto, Esquire, and Kathleen A. Gallagher, Esquire, each entered their appearance on behalf of petitioner before his formal arraignment. Also on May 20, 1993, petitioner received his notice regarding the time period for which to commence discovery and file and serve pretrial motions.

On May 23, 1994, petitioner appeared before the Honorable Lawrence O'Toole. William Manifesto, Esquire represented petitioner. Deputy District Attorney W. Christopher Conrad, Esquire, represented the Commonwealth. Petitioner completed a ten (10) page Guilty Explanation of Defendant's Rights form. Petitioner and the Commonwealth submitted to the Court the following negotiated plea bargain: (1) petitioner would plead guilty at Information CC 9302685 to Second Degree Murder and receive a sentence of life imprisonment; (2) petitioner would plead guilty at CC 199304232 to Count 1, Robbery and Count 2, Criminal Conspiracy (with respect to the Robbery of the victim), and receive no further penalty; (3) the Commonwealth would dismiss Count 3 at CC 199304232, Criminal Conspiracy (to commit Criminal Homicide): and, (4) a sentencing exhibit would be tendered by the Commonwealth for the record to assist a future Pennsylvania Commutations Board and future governor in determining clemency. See

GP/ST 3-5[4].

After an extensive oral colloquy was conducted and a written guilty plea form was entered into evidence, Judge O'Toole accepted the plea and sentenced petitioner pursuant to the plea bargain. GP/ST 6-22. Thereafter, Judge O'Toole explained to petitioner about the right to appeal. The sentencing exhibit and sentencing order were made part of the official record at the same time on the day petitioner pled guilty. Petitioner did not effectuate an appeal or file post-sentencing motions.

On December 28, 1995, petitioner, through Caroline M. Roberto, Esquire, filed a Motion for Post-Conviction Collateral Relief Pursuant to the Post Conviction Relief Act of 1988. On July 18, 1996 petitioner, through Attorney Roberto, filed a Motion for Disqualification of Counsel, in order to disqualify Deputy District Attorney Conrad as counsel for the Commonwealth. This motion was denied on July 18, 1996. (HTI 9)[5].

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[4] Numerals in parentheses preceded by the letters "GP/ST" refer to pages of the Guilty Plea/Sentencing Transcript of May 23, 1994.

[5] Numerals in parentheses preceded by the designation "HTI" refers to pages of the PCRA Hearing Transcript dated July 18-19, 1996.

Evidentiary hearings were conducted before Judge O'Toole on July 18 and 19, 1996, and November 14, 1996. The following persons testified in petitioner's behalf: Attorney Manifesto, Bernard Eisen, Esquire (petitioner's father), petitioner, Tracy Rollins, Esquire (petitioner's sister), Bryan Amos (petitioner's brother-in-law) and Gary Boyd. The Commonwealth recalled Attorney Manifesto and also had Katherine Gallagher, Esquire, testify. On rebuttal, petitioner recalled Bernard Eisen and Janet Eisen (petitioner's mother). Various stipulations by the parties were made a part of the record.

On August 28, 1996, petitioner, through Attorney Roberto, filed a Memorandum of Law. On September 11, 1996, petitioner, through Attorney Roberto, filed Pennsylvania Board of Pardons Documents Containing Reasons for Recommending Commutation of Life Sentence. On September 15, 1996, petitioner, through Attorney Roberto, filed a Motion to Close the Record.

On November 14, 1996, at the conclusion of the hearing, argument by counsel was presented to Judge O'Toole. (HTII 96-120)[6].

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[6] Numerals in parentheses preceded by the designation "HTII" refers to pages of the PCRA Hearing Continuation Transcript dated November 14, 1996.

Thereafter, Judge O'Toole said that the parties could file briefs concerning the following: "whether or not [petitioner's] plea was unlawfully induced, or the circumstances made it likely that the inducement caused him to plead guilty, with specific reference to whether or not the Court did not conduct a sufficient on-the-record colloquy pursuant to Rule 319(ii)[.]" (HTII 120-121). On November 19, 1996, petitioner, through Attorney Roberto, filed a Supplemental Brief Re: Insufficiency of the Guilty Plea Colloquy. On November 26, 1996, the Commonwealth, through Deputy District Attorney Conrad, filed a Memorandum of Law. On December 2, 1996, petitioner, through Attorney Roberto, filed a Motion to Strike the Commonwealth's Untimely "Memorandum of Law," which was denied.

On December 31, 1996 Judge O'Toole issued an order granting petitioner a new trial pursuant to the PCRA on the basis that the court did not conduct a sufficiently thorough plea colloquy pursuant to Rule 319(b) of the Pennsylvania Rules of Criminal Procedure because the sentencing exhibit was part of the plea and the court failed to place petitioner's specific understanding of this document on the record.

On January 17, 1997, petitioner appeared before Judge O'Toole for a bail hearing. Attorney Roberto represented petitioner. Deputy District Attorney Conrad represented the Commonwealth. At the conclusion of the bail hearing, Judge O'Toole denied bail, because the

Commonwealth notified the Court that it intended to appeal the order granting relief and the Court believed that no condition it could impose, including the amount of bail, would adequately assure that petitioner would appear for trial, given: (a) the procedural posture of the case; and, (b) the merits of the case. (BHT 2-4, 8-11)[7].

On January 21, 1997, the Commonwealth, through Assistant District Attorney Thomas N. Farrell, Esquire, filed a Notice of Appeal. The Commonwealth's appeal was ultimately docketed at **No. 168 Pittsburgh 1997**.

On January 30, 1997, petitioner, through Attorney Roberto, filed an Application for Pretrial Release in a Criminal Matter Pursuant to Rule1762 in the Superior Court of Pennsylvania. On February 4, 1997, the Superior Court denied petitioner's application for bail.

On February 12, 1997, petitioner, through Attorney Roberto, filed a Reconsideration of Application for Pretrial Release in a Criminal Matter Pursuant to Rule 2543. On February 14, 1997, Judge O'Toole filed his Opinion. On February 21, 1997, the Superior Court denied petitioner's

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[7] Numerals preceded by the letters "BHT" refer to the respective pages of the Bail Hearing Transcript of January 17, 1997.

request for reconsideration.

On March 12, 1997, petitioner, through Attorney Roberto, filed an Emergency Application for Review of Superior Court Order Denying Application for Bond in the Supreme Court of Pennsylvania, which was docketed at **No. 32 W.D. Miscellaneous Docket 1997**. On March 13, 1997, the Commonwealth, through Assistant District Attorney Farrell, responded by letter. On March 17, 1997, the Supreme Court denied petitioner's Emergency Application.

On June 4, 1997, the Commonwealth, through Assistant District Attorney Farrell, filed a Motion to Amend, to include the trial court number CC 199304232 in the notice of appeal. On June 27, 1997, the Superior Court granted the motion. On June 27, 1997, the Commonwealth, through Assistant District Attorney Farrell, filed an Amended Notice of Appeals.

On June 12, 1997, the Commonwealth, through Assistant District Attorney Farrell, filed its Brief for Appellant, a Motion for Leave to Present Oral Argument and the Reproduced Record (consisting of two volumes, Volume I and Volume II) in the Superior Court of Pennsylvania, which was docketed at **No. 168 Pittsburgh 1997**. On appeal, the Commonwealth raised the following issue:

> 1. The PCRA Court erred in ruling that appellee was entitled to a new trial when the Court did not, nor could not find, that William Manifesto, Esquire, gave

ineffective assistance when Mr. Manifesto took the best course of action for his client and appellee [petitioner] received the benefit of his plea bargain.

A. Mr. Manifesto had an objectively reasonable strategy for his actions.

B. Appellee failed to demonstrate actual outcome determinative prejudice.

On June 18, 1997, petitioner, through Attorney Roberto, filed an Answer and Objection to Appellant's Motion for Leave to Present Oral Argument. On June 20, 1997, the Commonwealth, Assistant District Attorney Farrell, filed its Reply to Answer and Objections to Appellant's Motion for Leave to Present Oral Argument. On June 27, 1997, the Superior Court granted the Commonwealth's Motion for Leave to Present Oral Argument.

On June 30, 1997, petitioner, through Attorney Roberto, filed, in the Court of Common Pleas of Allegheny County, a Petition for Immediate Release on Nominal Bond Pursuant to Rule 1100(e) of the Pennsylvania Rule of Criminal Procedure and Memorandum of Law. On July 15, 1997, an argument on the petition was held before Judge O'Toole. Attorney Roberto represented petitioner. Assistant District Attorney Farrell represented the Commonwealth. Following the argument, the Commonwealth was given leave to respond. On August 11, 1997, the Commonwealth, through Assistant District Attorney Farrell, filed its Answer to Petition for Immediate Release on Nominal

Bond Pursuant to Rule 1100(e) of the Pennsylvania Rule of Criminal Procedure and Memorandum of Law [also known as Petitioner's Second (2) request for Bond Pending Appeal]. On August 12, 1997, the Commonwealth, through Assistant District Attorney Farrell, filed its Supplemental Answer to Petition for Immediate Release on Nominal Bond Pursuant to Rule 1100(e) of the Pennsylvania Rule of Criminal Procedure and Memorandum of Law [also known as Petitioner's Second (2) request for Bond Pending Appeal].

On August 13, 1997, petitioner, through Attorney Roberto, filed his Brief for Appellee in the Superior Court of Pennsylvania.

On August 18, 1997, petitioner, through Attorney Roberto, filed Petitioner's Reply to Commonwealth's Answer to Petition for Nominal Bond Pursuant to Rule 1100 (e).

On August 29, 1997, the Commonwealth, through Assistant District Attorney Farrell, filed its Reply Brief with the Superior Court.

On September 8, 1997, Judge O'Toole denied petitioner's Petition for Nominal Bond.

On September 15, 1997, petitioner, through Attorney Roberto, filed an Application for Immediate Release Pending Appeal Pursuant to Pa.R.A.P. 1762(b) and Pa.R.Crim.P. 1100(e) in the Superior Court. On October 2, 1997, the Superior Court directed the Commonwealth to file a response. On October 8, 1997, the Commonwealth, through Assistant

District Attorney Farrell, filed its Answer in Opposition to Appellee's Second (2) Application for Immediate Release Pending Appeal in the Superior Court. On October 20, 1997, the Superior Court denied petitioner's Application for Immediate Release.

On November 19, 1997, petitioner, through Attorney Roberto, filed an Emergency Application Pursuant to Pa.R.A.P. 3315 of an Order of the Superior Court Denying "Application for Immediate Release Pending Appeal Pursuant to Pa.R.A.P. 1762(b) and Pa.R.Crim.P. 1100(e)" and an Emergency Application for Oral Argument and Disposition of a Single Justice Pursuant to Pa.R.A.P. 123(e) and Supreme Court I.O.P., 210 Pa. Code § 63.6(c) and (d) in the Supreme Court of Pennsylvania, which were docketed at **No. 139. W.D. Miscellaneous Docket 1997.** On November 21, 1997, the Commonwealth, through Assistant District Attorney Farrell, filed an Answer to Emergency Application Pursuant to Pa.R.A.P. 3315 of an Order of the Superior Court Denying "Application for Immediate Release Pending Appeal Pursuant to Pa.R.A.P. 1762(b) and Pa.R.Crim.P. 1100(e)" (The Second Emergency Application for Bond to this Honorable Court) and a letter of notification with the Supreme Court that it would not answer petitioner's Emergency Application for Oral Argument.

On November 21, 1997, the Supreme Court of Pennsylvania

issued an Order denying both petitioner's Emergency Application Pursuant to Pa.R.A.P. 3315 and his Emergency Application for Oral Argument.

On May 19, 1998, the Superior Court of Pennsylvania vacated the judgment of the Court of Common Pleas of Allegheny County and reinstated the judgment of sentence. On June 2, 1998, petitioner, through Attorney Roberto, filed an Application for Reargument En Banc with the Superior Court. On July 30, 1998, the Superior Court denied petitioner's Application for Reargument En Banc.

On August 31, 1998, petitioner, through Attorney Roberto and David Rudovsky, Esquire, filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, which was docketed at **No. 571 W.D. Allocatur Docket 1998**. On December 1, 1998, the Supreme Court denied the petition.

On December 14, 1998, petitioner, through his father Bernard Eisen, Esquire, filed an Application for Reconsideration of Denial of Allowance of Appeal with the Pennsylvania Supreme Court. Thereafter, on February 11, 1999, petitioner, through Attorney Eisen, filed a Petition for Permission to File an Amendment to Application for Reconsideration of Denial of Allowance of Appeal and an Amendment to Application for Reconsideration of Denial of Allowance of Appeal. On March 16, 1999, the Supreme Court of Pennsylvania entered and filed an Order denying

both the Application for Reconsideration of Denial of Allowance of Appeal and the Petition for Permission to File an Amendment to Application for Reconsideration of Denial of Allowance of Appeal.

On January 28, 1998, while the Commonwealth's appeal was pending before the Superior Court, petitioner, through Attorney Roberto and James B. Lieber, Esquire, filed a Petition for Writ of Habeas Corpus Pursuant to 28 United States Code §2254, a Brief in Support of Petition for Writ of Habeas Corpus Pursuant to 28 United States Code §2254 and an Appendix to the Brief in Support of Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Pennsylvania, which was docketed at Civil Action No. 98-187. In his petition, petitioner presented two claims: (1) the Commonwealth had allegedly denied him his right to due process in denying him nominal or reasonable bail pending resolution of the Commonwealth's appeal and his possible retrial, ostensibly in violation of the Fourteenth Amendment; and, (2) the Commonwealth had allegedly denied him his right to be free from excessive bail, as guaranteed by the Eighth Amendment and ostensibly applied to the states by the Fourteenth Amendment.

On April 6, 1998, the Commonwealth, through Assistant District Attorney Farrell, filed Commonwealth's Answer to Petition for Writ of Habeas Corpus. On May 13, 1998, petitioner, through Attorney Lieber

and Attorney Roberto, filed Petitioner's Reply Brief to Commonwealth's Answer to Petition for Writ of Habeas Corpus. On May 21, 1998, the Commonwealth, through Assistant District Attorney Farrell, filed Commonwealth's Supplemental Answer to Petition for Writ of Habeas Corpus. On March 9, 1999, Chief Magistrate Judge Kenneth J. Benson issued his Magistrate Report and Recommendation with respect to petitioner's initial (and then pending) habeas corpus petition, recommending that petitioner's (first) habeas corpus petition be dismissed as moot. On April 13, 1999, United States District Court Judge Gary L. Lancaster issued a Memorandum Order, with respect to petitioner's initial habeas corpus petition, adopting the March 8, 1999, Magistrate Judge's Report and Recommendation and dismissing petitioner's first habeas corpus petition as moot.

On or about October 1, 1999, petitioner, through Attorney Roberto and David Rudovsky, Esquire, filed a Petition for Writ of Habeas Corpus by a Person in State Custody and Appendix, which was docketed in the United States District Court for the Western District of Pennsylvania at Civil Action No. 99-1624. In his petition, petitioner raised the following claims:

> A. The prosecutor's breach of the plea agreement rendered petitioner's guilty plea unknowing and involuntary and was therefore unlawfully induced.
>
> B. The guilty plea was not knowingly or intelligently

entered.

C. Counsel's ineffectiveness rendered petitioner's plea involuntary, unknowing, and unintelligent for the following reasons:

1. Failure to Investigate and/or Advise Petitioner of Viable Defenses;

2. Failure to Object to the Prosecution's Crucial, Last Minute Alteration to the Sentencing Exhibit;

3. Failure to Independently Research the Most Recent Information Available Regarding the Eligibility of Life Prisoners for Commutation When That Information Formed the Foundation of the Plea Agreement; and,

4. Advising Petitioner to Surrender His Cherished Trial Rights and Be Sentenced to Life Imprisonment Without Parole In Exchange for An Illusory Expectation of Gubernatorial Clemency.

On February 1, 2000, the Commonwealth, through Assistant District Attorney Richard A. Bozigar, Esquire, filed Commonwealth's Answer to Petition for Writ of Habeas Corpus. On March 31, 2000, petitioner, through Attorney Roberto and Attorney Rudovsky, filed Petitioner's Reply to Respondent's Answer and an Index of Respondent's Reproduced Record.

On June 26, 2000, petitioner, through Attorney Rudovsky, Attorney Roberto, and Attorney Lieber, filed a Motion to Take Discovery for the Purposes of Authenticating Videotape Document with Proposed Order and a Brief in Support. On June 26, 2000, the Commonwealth, through Assistant District Attorney Bozigar, filed

Commonwealth's Response to Petitioner's Reply to Respondent's Answer. On July 12, 2000, Magistrate Judge Kenneth J. Benson granted the discovery motion. On July 17, 2000, the Commonwealth, through Assistant District Attorney Bozigar, filed Commonwealth's Motion for Reconsideration of Order Granting Petitioner's Motion for Discovery. On July 25, 2000, Magistrate Judge Benson denied reconsideration. On August 18, 2000, petitioner, through Attorney Rudovsky, Attorney Roberto, and Attorney Lieber, filed a Motion to Introduce Portions of Videotaped Newscast and Exhibit A.

On January 9, 2002, Magistrate Judge Benson issued his Report and Recommendation that the petition be dismissed and a certificate of appealability be denied. On March 8, 2002, petitioner, through counsel, filed Petitioner's objections to the Report and Recommendation of the Magistrate Judge. On April 5, 2002, United States District Court Judge Gary L. Lancaster issued an Order adopting the Report and Recommendation that the petition be dismissed and a certificate of appealability be denied.

On April 29, 2002, petitioner, through counsel, filed a Notice of Appeal. Petitioner's appeal was docketed in the United States Court of Appeals for the Third Circuit at No. 02-2230. On May 22, 2002, petitioner, through Attorney Rudovsky, Attorney Roberto, and Attorney Lieber, filed an Application for Certificate of Appealability. On May 29,

2002, the Commonwealth, through Assistant District Attorney Ronald M. Wabby, Jr., filed Commonwealth's Memorandum in Opposition to Issuance of a Certificate of Appealability. On June 11, 2002, petitioner, Attorney Rudovsky, Attorney Roberto, and Attorney Lieber, filed Appellant's Reply to Commonwealth's Memorandum in Opposition to Issuance of a Certificate of Appealability. On February 23, 2003, the United States Court of Appeals for the Third Circuit denied a certificate of appealability. On March 10, 2003, petitioner, through Attorney Rudovsky, Attorney Roberto, and Attorney Lieber, filed an Appellant's Petition for Rehearing or Rehearing En Banc. On June 26, 2003, the United States Court of Appeals for the Third Circuit denied the petition for rehearing.

On September 19, 2003, petitioner, through Attorney Rudovsky, Attorney Roberto, and Attorney Lieber, filed a Petition for Writ of Certiorari in the United States Supreme Court, which is currently docketed at No. 03-437. In his petition, petitioner has presented the following questions for review:

> 1. Whether the denial of a certificate of appealability ("COA") by the court of appeals was in direct contravention of the standards established by this Court in *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003), in that the lower courts denied a COA on the impermissible ground that petitioner would not prevail on the merits of the claims because the state court adjudication on the constitutional issues was not unreasonable under the provisions of 28 U.S.C. §2254(d)(1)(2).

2. Whether the denial of a COA was in error where the district court failed to consider newly discovered evidence that the prosecutor had deceived the petitioner with respect to the supposed benefits of the plea agreement in order to secure petitioner's waiver of his right to a jury trial, and where petitioner is barred from raising this claim in a successive petition.

3. Whether the denial of a COA was in direct contravention of the standards established by this Court in that petitioner made a substantial showing that his guilty plea was involuntary or knowing, where the state trial judge, a jurist of reason, vacated the guilty plea on these grounds, and where (a) petitioner was erroneously assured that under his plea agreement with the prosecution his life sentence would be commuted in 10-12 years, (b) the prosecutor unilaterally made a material change to the plea agreement, and (c) the prosecutor deliberately breached the plea agreement by secretly filing materials that contradicted the terms of the plea agreement.

REASONS FOR DENYING THE WRIT

I. THE DENIAL OF A CERTIFICATE OF APPEALABILITY BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT OF APPEALS WAS IN ACCORD WITH THE STANDARD ESTABLISHED BY THIS COURT IN *MILLER-EL V. COCKRELL*, 537.

On the issue of whether this Court should grant a Petition for Writ of Certiorari, Supreme Court Rule 10 provides as follows:

> **Rule 10. Considerations Governing review on Certiorari**
>
> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following although neither controlling nor fully measuring the Court's discretion, indicate the character of reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort, or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

On February 23, 2003, the United States Court of Appeals for the Third Circuit denied petitioner's request for the issuance of a certificate of appealability. The United States Court of Appeals for the Third Circuit stated:

> The foregoing request for a certificate of appealability is denied. For essentially the reasons set forth in the Magistrate Judge's January 10, 2002, Report and Recommendation, Appellant has failed to make a "substantial showing of the denial of a constitutional right" on any of the claims raised in his habeas petition. *See* 28 U.S.C. §2253(c)(2).

App. 1-2[8]. Petitioner argues that the United States Court of Appeals for the Third Circuit's denial of a certificate of appealability was impermissible under the standard announced by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029 (2003). A state petitioner does not have an absolute right to appeal the District Court's denial of his federal habeas petition. 28 U.S.C.A. §2253; *Miller-El*, 537 U.S. at 336, 123 S.Ct. at 1039. In order for the Court of Appeals to accept petitioner's appeal, petitioner must request a certificate of appealability from the

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[8] The designation "App." refers to pages of petitioner's Appendix attached to his Petition for Writ of Certiorari.

circuit court. *Id.* Under 28 U.S.C.A. §2253(c)(2). a certificate of appealability may be issued "if the applicant has made a substantial showing of the denial of a constitutional right." In *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595 (2000), this Court held:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Slack, 529 U.S. at 484, 120 S.Ct. at 1604. Also, this Court has stated:

> The COA determination under §2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Miller-El, 537 U.S. at 336-337, 123 S.Ct. at 1039. Thus, in order to properly review a request for a certificate of appealability, the Court of Appeals must not fully examine the merits of the petition under 28 U.S.C.A. §2254 analysis. *Miller-El*, 537 U.S. at 341, 123 S.Ct. at 1042.

In applying the above standards to the instant case, the Court of Appeals for the Third Circuit found that petitioner failed to make a

"'substantial showing of the denial of a constitutional right" on any of the claims raised in his habeas petition." App. 1-2. It is clear from the Order that the Court of Appeals properly conducted only the overview and general assessment necessary to determine whether the District Court's resolution was debatable amongst jurists of reason. Unlike the Court of Appeals for the Fifth Circuit in *Miller-El v. Cockrell, supra.*, the Court of Appeals for the Third Circuit did not examine the application for a certificate of appealability under 28 U.S.C.A. §2254 analysis. The Court of Appeals for the Third Circuit denied the certificate of appealability in accord with the standards set forth in 28 U.S.C.A. §2253; *Slack v. McDaniel, supra.* and *Miller-El v. Cockrell, supra.* Thus, petitioner would not be entitled to the grant of a Writ of Certiorari, because the Court of Appeals for the Third Circuit's resolution was not in conflict with the decisions of this Court.

II. THE DENIAL OF A CERTIFICATE OF APPEALABILITY WAS NOT IN ERROR BECAUSE THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT CONSIDERED THE NEWLY DISCOVERED EVIDENCE.

Petitioner asserts that the United States District Court for the Western District failed to consider newly discovered evidence. The evidence to which petitioner refers to in his petition was presented to the Magistrate Judge in a motion filed by petitioner on August 18, 2000. Petitioner alleges that the evidence demonstrates that the prosecutor intended to deceive petitioner as to the value of a sentencing exhibit that was introduced at petitioner's sentence.

In the Report and Recommendation, the Magistrate Judge rejected petitioner's claim that the prosecutor breached the plea agreement and rendered the plea unlawfully induced. In petitioner's objections to the report and recommendation, petitioner again presented the argument that the new evidence proved petitioner's claim. The District Court Judge issued an Order adopting the Report and Recommendation that the petition be dismissed and a certificate of appealability be denied. Clearly petitioner's evidence was considered by the district court and rejected. The United States Court of Appeals for the Third Circuit denied petitioner's request for the issuance of a certificate of appealability, because petitioner failed to make a "'substantial showing of the denial of a constitutional right" on any of the claims

raised in his habeas petition." App. 1-2. The Court of Appeals denied the certificate of appealability in accord with the standards set forth in *Slack v. McDaniel, supra.* and *Miller-El v. Cockrell, supra.* Thus, petitioner would not be entitled to the grant of a Writ of Certiorari, because the Court of Appeals for the Third Circuit's resolution was not in conflict with the decisions of this Court.

III. THE DENIAL OF A CERTIFICATE OF APPEALABILITY WAS IN ACCORD WITH THE STANDARD ESTABLISHED BY THIS COURT WHERE PETITIONER FAILED TO MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT REGARDING PETITIONER'S GUILTY PLEA.

Petitioner argues that his guilty plea was not voluntary, knowing, intelligent, because petitioner believed that he would receive commutation within a ten (10) to twelve (12) year time period as part of his plea agreement. Petitioner argues that under *Miller-El v. Cockrell, supra.* petitioner was entitled to a certificate of appealability.

On appeal from the grant of a new trial, the Superior Court of Pennsylvania found as follows:

> By entering the negotiated plea to homicide, robbery, and conspiracy, but being sentenced only on the homicide, the path was clear to provide a pre-orchestrated plan to commute the sentence in the event a more benevolent administration came into office in the years to come. The various statistical analyses employed by trial and PCRA counsel as to the likelihood of commutation do not alter the fact that the bargain provided for commutation which would be unavailing if there was a conviction, as most certainly would have occurred had there been a trial. In a further step, which is almost unprecedented, the appellee wrote a letter to the victim's family acknowledging that he was sorry for his actions and by pleading guilty sought to save them and his own family the agony of a trial. This letter was incorporated in the affidavit, which was to be submitted by the Commonwealth as part of the record, for consideration by a future commutation board.
>
> Based upon this evidence and the sufficient colloquy conducted by the sentencing court, we find it clear appellee knowingly, voluntarily and intelligently

> entered his guilty plea. Whether appellee accurately understood the function, application and effect of the sentencing exhibit is immaterial to a fact-finder's determination of guilt or innocence. Moreover, the record is devoid of any evidence in support of appellee's argument he was deceived, misled or misinformed with respect to the sentencing exhibit. Based upon the foregoing, we find no basis for post-conviction relief.

App. 105.

When deciding the claims under the federal habeas statute, covered instantly by the amendments of the Anti-Terrorism and Effective Death Penalty Act, the federal courts must apply the presumption of correctness regarding factual and legal conclusions reached by the state courts as contained in 28 U.S.C.A. §2254 (d) and (e).

The Superior Court decision was not clearly contrary to federal law as determined by the Supreme Court of the United States. Furthermore, the Superior Court's determination was not an unreasonable determination of established federal law as determined by the Supreme Court of the United States. Thus, petitioner would not be entitled to habeas relief. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1523 (2000). When the claim was presented in the habeas petition, the District Court concluded that the Superior Court decision was not clearly contrary to federal law as determined by the Supreme Court of the United States. Furthermore, the Superior Court's determination was not an unreasonable determination of established federal law as

determined by the Supreme Court of the United States. Consequently, the court concluded that petitioner would not be entitled to habeas relief.

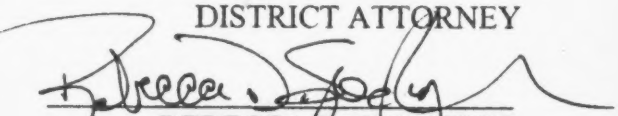
The United States Court of Appeals for the Third Circuit denied petitioner's request for the issuance of a certificate of appealability. Petitioner would not be entitled to the grant of a Writ of Certiorari, because the Court of Appeals for the Third Circuit's resolution was not in conflict with the decisions of this Court.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests this Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

STEPHEN A. ZAPPALA, JR.
DISTRICT ATTORNEY



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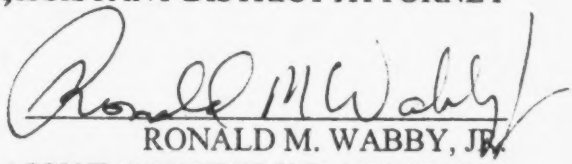

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I hereby certify that I am this day serving three (3) copies each of the within Respondents Brief In Opposition On Petition For Writ Of Certiorari To United States Court of Appeals to the Third Circuit in the manner indicated below which service satisfies the requirements of Supreme Court of United States Rule 29

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